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No. 75-405

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL COMMISSION ON EGG NUTRITION,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 517 F.2d 485. The opinion of the district court (Pet. App. 11a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1975. The court of appeals denied a

timely petition for rehearing on June 17, 1975. The petition for a writ of certiorari was filed on September 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment bars a court from temporarily enjoining a trade association, pending conclusion of a Federal Trade Commission proceeding concerning the association's advertisements, from falsely advertising that there is no evidence that consumption of its members' food products may be harmful, where the injunction does not prevent the association from making a fair presentation of its side of the controversy about the possible harm.

2. Whether, in view of the nature of the particular asserted misrepresentations involved in this case, the lower courts properly assessed the apparent falsity of the challenged advertisements on the basis of affidavits, briefs, and oral argument, without a full-scale evidentiary hearing of the sort being conducted by the Commission.

3. Whether Section 13(a) of the Federal Trade Commission Act, in providing that a district court shall issue a temporary injunction upon a showing by the Commission of a reasonable belief that an advertisement for food is false, nevertheless requires the court to apply the traditional criteria for such injunctive relief.

STATUTES INVOLVED

Sections 5, 12, and 13 of the Federal Trade Commission Act, 38 Stat. 719, 52 Stat. 114-115, as amended, 15 U.S.C. 45, 52, and 53, are set forth in pertinent part at Pet. App. 25a-27a. Section 15 of the Act, 52 Stat. 116, as amended, 15 U.S.C. 55, provides in pertinent part:

> For the purposes of sections 12, 13, and 14—
>
> (a)(1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisements, or under such conditions as are customary or usual. * * *
>
> * * * *
>
> (b) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.
>
> * * * *

STATEMENT

Petitioner, a private, not-for-profit corporation composed of representatives of various associations of egg producers, caused paid advertisements to be disseminated in commerce representing in substance that there is no scientific evidence that eating eggs increases the risk of heart disease or of a heart attack. On August 1, 1974, the Federal Trade Commission filed an administrative complaint against petitioner alleging that such advertisements were materially misleading and hence "false" within the meaning of Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, and that petitioner had therefore violated Sections 5 and 12 of the Act, 15 U.S.C. 45 and 52, concerning false advertisements for food. On the same day, the Commission also applied to the district court under Section 13(a) of the Act, 15 U.S.C. 53 (a), for a temporary injunction restraining petitioner from disseminating such advertisements pending completion of the administrative proceeding. (Pet. App. 1a-2a.)

The Commission presented evidence that there is a medical controversy concerning the effects of dietary cholesterol in humans and that there is considerable expert opinion that eating eggs does entail such risks, based upon experimental evidence showing a correlation, and possibly a causal relation, between high levels of dietary cholesterol resulting from eating eggs and other foods with a high cholesterol content and increased risk of heart disease (Pet. App. 2a).

Petitioner presented evidence tending to support its view of the controversy concerning the relationship of dietary cholesterol, egg consumption, and heart disease.

The district court, after hearing oral argument, held that it had jurisdiction over petitioner and its advertising, and that the Commission had demonstrated a reasonable basis for its assertion that the advertisements were false within the meaning of Section 15 (Pet. App. 21a). The court denied the Commission's application for a temporary injunction, however, on the ground that the Commission had not shown that such an injunction "would be to the 'interest of the public' " within the meaning of Section 13(a), and had not otherwise satisfied the traditional equitable conditions for issuance of a temporary injunction (*id.* at 21a-24a).

The court of appeals reversed, holding that the Commission had met all applicable statutory conditions for the issuance of the temporary injunction (*id.* at 2a-6a). The court also directed that an injunction should be entered barring petitioner from disseminating

> statements to the effect that there is no scientific evidence that increased intake of dietary cholesterol resulting from eating eggs increases the risk of heart disease or attendant or related conditions or other statements tending to misrepresent the state of scientific evidence on the subject in question. [*Id.* at 6a.]

The court of appeals provided, however, that "the injunction should not go so far as to prohibit [petitioner] from making a fair presentation of its side of the controversy" (*ibid.*) and should not

> prohibit [petitioner] from stating that there is scientific evidence supporting the theory that dietary cholesterol intake is not harmful, or from describing that evidence, provided that it also states that there is substantial contrary evidence. [*ibid.*] [1]

ARGUMENT

1. Petitioner contends that the decision of the court of appeals conflicts with this Court's recent decision in *Bigelow* v. *Virginia*, No. 73-1309, decided June 16, 1975, because the court of appeals "talismanically swept aside NCEN's First Amendment claims" solely on the ground "that NCEN's publications were 'commercial'" (Pet. 6). In fact, however, the decision did not apply a mechanical rationale.

Thus, the court of appeals recognized that "the First Amendment is not 'wholly irrelevant'" to "commercial advertising" (Pet. App. 5a), and the decision

[1] The injunction applies only to petitioner and does not restrain advertising by petitioner's members. Petitioner's motion asking the district court to vacate the injunction entered by the district court on remand is currently pending.

The administrative proceeding on the merits of the controversy before the Commission has continued. The evidentiary hearing before the administrative law judge of the Commission has been concluded, post-hearing briefs have been filed, and the Commission has ordered the administrative law judge to file his initial decision by November 24, 1975.

expressly preserved petitioner's right to "espouse one side of a genuine controversy" (*id.* at 5a-6a).[2] The court's narrow holding is consistent with the long-accepted proposition that "'[t]here is no constitutional right to disseminate false or misleading advertisements.' *E. F. Drew & Co.* v. *F.T.C.*, 235 F.2d 735, 740 (2d Cir. 1956)" (Pet. App. 6a).[3] The court of appeals' determination of the false and misleading

[2] Although it antedated this Court's decision in *Bigelow*, the court of appeals' decision was not, as *amicus* suggests (Br. 5), based on a "lingering misapprehension that an expansive reading of the doctrine of *Valentine* v. *Chrestenson*, 316 U.S. 52 (1942), was controlling." The majority did not even mention *Valentine*, relying instead on this Court's recent decision in *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 384-389 (Pet. App. 5a), which made clear even before *Bigelow* that *Valentine* was not entitled to an "expansive reading."

[3] The contention of *amicus* that the court of appeals' order abridges petitioner's constitutional rights by compelling it to express an opinion not of its own choosing (Br. 8) is not made by petitioner and is not properly before the court. In any event, the order does not require petitioner to express any opinion about the dietary cholesterol controversy, but rather merely requires it to include in its advertisements a material fact (*i.e.*, that there is contrary evidence) if it does choose to advertise its side of the controversy (Pet. App. 6a). Such affirmative disclosure provisions have long been sustained. *E.g.*, *S.S.S. Co.* v. *Federal Trade Commission*, 416 F.2d 226, 231 (C.A. 6); *Ward Laboratories, Inc.* v. *Federal Trade Commission*, 276 F.2d 952, 955 (C.A. 2), certiorari denied, 364 U.S. 827. *Amicus's* reliance on this Court's decisions concerning the freedom of publishers or operators of other media to determine what they will publish is misplaced, for those cases do not remotely suggest that, to avoid false or misleading representations, an advertiser cannot be required to include a material fact if it chooses to advertise.

character of petitioner's advertisements, in suggesting the absence of a controversy about the health consequences of egg consumption, is not challenged here.

Bigelow does not impair the well-established authority of the government to restrain false, misleading, or fraudulent commercial advertising. That case involved a prosecution of a newspaper editor, whose paper had published in Virginia a truthful advertisement containing information about abortions performed in New York, for violation of a Virginia statute prohibiting the publication of information about abortions. In holding the statute unconstitutional as applied, the Court rested on the state's lack of any valid regulatory interest in the subject of the advertisements. However, the Court specifically noted that its decision did not apply to "deceptive or fraudulent" advertisements (slip op. 18) and that a different case might be presented if the statute were applied "against the advertiser" rather than the publisher (*ibid.*). Petitioner's claim of a conflict with *Bigelow* is without substance.[4]

2. Petitioner contends that the court of appeals followed a "constitutionally defective procedure" (Pet. 7) in finding, on the record before it, that petitioner's advertisements falsely represented the absence of a genuine scientific controversy and, in any event, that the Commission showed reason to believe that petitioner had done so. That claim is incorrect.

[4] Since no question of the application of the First Amendment to false advestisements is presented in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Councils*, No. 74-895, probable jurisdiction noted, 420 U.S. 971, there is no reason to hold this petition pending the disposition of that case.

The concurrent findings of the courts below that the Commission had the requisite reason to believe that petitioner's advertisements were false were based on a factual record made at an adversary judicial hearing at which petitioner had an opportunity to present evidence. After noting that in some cases "a full evidentiary hearing" might be required (Pet. App. 14a), the district court properly concluded that "in the present case" such a hearing was "unnecessary" (*id.* at 16a). See *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, 412 F.2d 541, 546 (C.A. 9). Petitioner has not shown how it was prejudiced by that ruling, and its real grievance is with the factual conclusion of the courts below, not with the basis on which it was reached.

In any event, this Court's decisions do not invariably require a full-scale evidentiary hearing before a court may temporarily enjoin commercial advertisements that the Commission has shown reason to believe are materially deceptive and false, and the question whether such a hearing might have been required in this case is of insufficient general importance to warrant review.[5]

[5] The decision below does not conflict with *Blount* v. *Rizzi*, 400 U.S. 410. The Court there held unconstitutional a statute requiring a district court, upon the Postmaster's showing of

3. Finally, petitioner contends that the court of appeals failed to follow its prior decisions in *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 191 F.2d 744 (C.A. 7), and other cases, which, petitioner claims, read Section 13(a) as implicitly incorporating all the traditional criteria for equitable relief (Pet. 10-11). Even if there were such a conflict, however, that would be a matter for resolution by the court of appeals, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

In any event, the court of appeals specifically followed *Rhodes Pharmacal*, which it termed "controlling in this case" (Pet. App. 4a-5a), in holding that the Commission was entitled to relief under Section 13(a) upon a satisfactory showing of the requisite "reason to believe" that petitioner's advertisements

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probable cause to believe that a person was using the mails to sell or disseminate obscene matters, to grant an injunction directing the Post Office to detain all of the person's incoming mail pending the conclusion of administrative proceedings. Under the injunction, the person would have been entitled to receive only such mail as was determined by the Post Office to be "clearly not connected with the alleged unlawful activity," and would have had to go to the Post Office to open the detained mail before that determination could be made (400 U.S. at 414). In finding this sweeping remedy constitutionally deficient, the Court stressed the broad impact of the injunction on a person's use of the mails (*id.* at 416), and stated that " 'constitutionally protected expression * * * is often separated from obscenity only by a dim and uncertain line * * *' " (*ibid.*). Neither consideration is applicable here: "false" advertising does not present definitional difficulties such as those that have long plagued the law of "obscenity," and the injunction is limited in scope to the particular type of advertising in question.

were false, without having to satisfy all the traditional equity standards (*id.* at 5a). Accord, *Federal Trade Commission* v. *Thomsen-King & Co.*, 109 F.2d 516 (C.A. 7); *Securities & Exchange Commission* v. *Frank*, 388 F.2d 486, 492 (C.A. 2) (dictum).[6] The court of appeals' decision was correct, and there is no conflict requiring resolution by this Court.[7]

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[6] In claiming a conflict petitioner relies (Pet. 12) upon the district court decision in *Federal Trade Commission* v. *Sterling Drug, Inc.*, 215 F. Supp. 327, 332 (S.D.N.Y.), affirmed, 317 F.2d 669 (C.A. 2). The court of appeals' affirmance in that case, however, rested upon the determination that the Commission had failed to demonstrate reason to believe the advertisements were false, and the court expressly refrained from endorsing the district court's ruling as to the applicability of traditional equitable standards (317 F.2d at 678).

[7] In any event, since the court of appeals found in this case that the challenged advertisements were in fact false (Pet. App. 6a), this is not an appropriate vehicle for determining the circumstances in which an injunction should issue based only on the Commission's showing of reason to believe that a food advertisement is false.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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